A

Public Prosecutor v Foo Kim Lai

B

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 41–94 OF 2006
SURAYA OTHMAN J
28 AUGUST 2008

C

Criminal Law — Penal Code (Malaysia) — s 379A — Theft — Ingredients of — Whether established by prosecution

D

Criminal Procedure — Appeal — Appeal to the High Court — Grounds of judgment not provided — Whether petition of appeal ought to be filed — Whether court could proceed with appeal to ensure substantial justice done

E

Criminal Procedure — Appeal — Appeal to the High Court — Non-appearance of respondent at appeal — Options open to appellate High Court

Criminal Procedure — Prosecution — Prosecution's case — Gaps in case — Whether prosecution's duty to fill up gaps

F

Criminal Procedure — Prosecution — Witnesses — Failure to call material witness — Effect on prosecution's case

G

Evidence — Presumption — Possession of stolen property — Whether prosecution had established basic elements to invoke presumption under s 114(a) of the Evidence Act 1950 — Evidence Act 1950 s 114

H

The complainant's car was stolen. He lodged Petaling Report No 3956/2001 to report the theft. Some five days after the theft, acting on information received from one Wong Chee Kong arrested in an unrelated police operation, PW2 raided the respondent's premises. There, a car similar to the complainant's was seized. The ignition key to the said car was also recovered

I

from the respondent. The complainant identified the car as his. The respondent was subsequently charged in the magistrates' court under s 379A of the Penal Code ('Code') for theft and alternatively under s 411 of the Code, for dishonestly receiving stolen property knowing it to be stolen. The respondent claimed trial. At the trial, evidence adduced from the prosecution

witnesses revealed the following: (i) the recovered car was in fact reported stolen vide Cheras Report 3988/01 which the investigating officer ('PW4') had no knowledge of; (ii) during PW4's investigation, the respondent informed him that the said car was purchased from someone named 'Ah Wah' but PW4 had failed to investigate this bit of information; (iii) PW4 also failed to carry out further investigation or to take any statement from Wong Chee Kong — the said Wong Chee Kong was not even called by the prosecution to give evidence. At the close of the prosecution's case, the magistrate acquitted and discharged the accused on both counts without calling for his defence. The prosecution appealed to the High Court. At the outset of the appeal, the High Court was informed that the notice of appeal could not be served upon the respondent as he could not be located. The DPP thus left it to the court's discretion whether to proceed with the appeal pursuant to s 314 of the Criminal Procedure Code ('CPC'). No grounds of judgment were prepared as the magistrate had left the judiciary. Nevertheless, the prosecution had filed its petition of appeal.

Held, dismissing the appeal:

(1) Where no grounds of judgment are provided, the petition of appeal ought not to be filed. The usefulness of the grounds of appeal as stated in the petition of appeal was doubtful since the reasons for appeal could only be justified upon examination of the grounds of judgment, which were non-existent in the instant case. The High Court would nevertheless proceed with the appeal pursuant to s 310 of the CPC, in order to ensure that substantial justice was done (see paras 10–12).

(2) Section 314 of the CPC provides two options to an appellate court. First, in the event the respondent is not present and the court is not satisfied that the notice of appeal was duly served on the respondent, the court shall not make any order adverse to or to the prejudice of the respondent. Instead, the court will adjourn the hearing of the appeal to a future date. The court registrar will then issue a new notice informing the respondent to be present on the new hearing date. Second, in the event the service of the notice of appeal cannot be effected on the respondent, the court will then proceed to hear the appeal in the absence of the respondent. In the instant case, the High Court would proceed with the appeal notwithstanding the absence of the respondent. To postpone it further to a later date would only add to the backlog of cases for the court to dispose of (see paras 16–18 & 22).

(3) The examination of the notes of evidence revealed that the prosecution had failed to satisfy the essential ingredients of s 379A of the Code. Other than proving that the property was a motor vehicle, the prosecution had failed to prove the remainder ingredients. There was no

evidence or witnesses that implicated the respondent in the theft of the vehicle. The magistrate was correct in acquitting and discharging the respondent without calling for his defence (see paras 28–29).

(4) The discrepancy between the police reports was a material fact for the court to consider, yet the prosecution offered no explanation. The said Wong Chee Kong who gave information leading to the respondent's arrest and recovery of the car, was a crucial witness and ought to have been called by the prosecution. The prosecution's failure to do so was fatal to its case (see paras 36–41).

(5) PW4's investigation was minimal and incomplete. It failed to assist the court in making finding of facts as to whether the respondent had any knowledge that the said vehicle was a stolen property and that he received or retained the stolen property dishonestly. Due to PW4's poor investigation a lot of gaps had been raised in the prosecution's case. It was the prosecution's duty and responsibility to fill up the gaps (see paras 42 & 47).

(6) The prosecution had failed to prove that the respondent had knowledge that the said vehicle constituted stolen property. The prosecution could not also invoke the presumption under s 114(a) of the Evidence Act 1950, since it had not proved the necessary elements. Firstly, there were doubts whether the recovered car was in fact stolen property. Secondly, the prosecution had also failed to show that the recovered car was actually in the possession of the respondent. Thirdly, discovery of the said car was not soon after the theft — it was recovered some five days from the date it was reported stolen (see paras 52–55).

[Bahasa Malaysia summary

Kereta pengadu telah dicuri. Dia telah membuat Laporan Petaling No 3956/2001 bagi melaporkan kecurian tersebut. Lima hari selepas kecurian tersebut, bertindak atas maklumat yang diterima daripada Wong Chee Kong yang ditangkap dalam operasi polis yang tidak berkaitan, PW2 telah menyerbu premis responden. Di situ, sebuah kereta yang sama seperti kepunyaan pengadu telah dirampas. Kunci kepada kereta tersebut juga ditemui daripada responden. Pengadu mengenal pasti kereta tersebut sebagai miliknya. Responden kemudian telah dituduh di mahkamah majistret di bawah s 379A Kanun Keseksaan ('Kanun') kerana mencuri dan secara alternatif di bawah s 411 Kanun tersebut, kerana menerima harta curi secara tidak jujur dengan mengetahui ianya dicuri. Responden menuntut agar dibicarakan. Semasa perbicaraan, keterangan yang dikemukakan oleh saksi pihak pendakwaan mendedahkan yang berikut: (i) kereta yang dijumpai pada hakikatnya dilaporkan telah dicuri melalui Laporan Cheras 3988/01 yang tidak diketahui oleh pegawai penyiasat ('PW4'); (ii) semasa siasatan PW4,

responden telah memberitahunya bahawa kereta tersebut telah dibeli daripada seseorang yang bernama 'Ah Wah' tetapi PW4 gagal menyiasat maklumat ini; (iii) PW4 juga gagal melaksanakan siasatan selanjutnya atau mengambil apa-apa kenyataan daripada Wong Chee Kong — Wong Chee Kong dikatakan tidak dipanggil oleh pihak pendakwaan untuk memberikan keterangan. Di akhir kes pihak pendakwaan, majistret telah melepas dan membebaskan tertuduh atas kedua-dua pertuduhan tanpa memanggil untuk pembelaannya. Pihak pendakwaan telah merayu ke Mahkamah Tinggi. Di permulaan rayuan, Mahkamah Tinggi telah memberitahu bahawa notis rayuan tidak boleh disampaikan kepada responden kerana dia tidak boleh dikesan. Timbalan pendakwa raya oleh itu menyerahkan kepada budi bicara mahkamah sama ada untuk meneruskan dengan rayuan itu menurut s 314 Kanun Prosedur Jenayah ('KPJ'). Tiada alasan penghakiman disediakan kerana majistret telah meninggalkan badan kehakiman. Meskipun begitu, pihak pendakwaan telah memfailkan petisyen rayuannya.

Diputuskan, menolak rayuan:

(1) Jika tiada alasan penghakiman disediakan, petisyen rayuan tidak patut difailkan. Kebergunaan alasan rayuan seperti dinyatakan dalam petisyen rayuan diragui memandangkan sebab-sebab rayuan hanya boleh dijustifikasikan setelah pemeriksaan alasan-alasan penghakiman, yang tidak wujud dalam kes ini. Meskipun begitu Mahkamah Tinggi meneruskan rayuan menurut s 310 KPJ untuk memastikan keadilan dilaksanakan (lihat perenggan 10–12).

(2) Seksyen 314 KPJ memperuntukkan dua pilihan untuk mahkamah rayuan. Pertama, sekiranya responden tidak hadir dan mahkamah tidak berpuas hati bahawa notis rayuan telah disampaikan ke atas responden, mahkamah tidak perlu membuat apa-apa perintah yang menyukarkan atau memudaratkan responden. Sebaliknya, mahkamah perlu menangguhkan pendengaran rayuan itu kepada satu tarikh di masa hadapan. Pendaftar mahkamah kemudian akan mengeluarkan notis baru memberitahu responden agar hadir pada tarikh pendengaran baru itu. Kedua, sekiranya penyampaian notis rayuan tidak boleh dilaksanakan ke atas responden, mahkamah akan terus mendengar rayuan itu tanpa kehadiran responden. Dalam kes ini, Mahkamah Tinggi akan meneruskan rayuan meskipun responden tidak hadir. Untuk menangguhkannya selanjutnya kepada tarikh kemudian akan hanya menambahkan beban kerja kes-kes untuk diselesaikan oleh mahkamah (lihat perenggan 16–18 & 22).

(3) Satu pemeriksaan nota keterangan menunjukkan bahawa pihak pendakwaan telah gagal memuaskan faktor penting s 379A Kanun. Selain daripada membuktikan bahawa harta itu adalah sebuah

kenderaan bermotor, pihak pendakwaan telah gagal membuktikan faktor lain. Tiada keterangan atau saksi yang mengatakan responden terbabit dalam kecurian kenderaan itu. Majistret adalah betul dalam melepas dan membebaskan responden tanpa memanggil untuk pembelaannya (lihat perenggan 28–29).

(4) Percanggahan antara laporan-laporan polis tersebut merupakan fakta penting untuk pertimbangan mahkamah namun pihak pendakwaan tiada penjelasan. Wong Chee Kong yang dikatakan memberi maklumat yang membawa kepada tangkapan responden dan penemuan kereta itu merupakan saksi penting dan patut dipanggil oleh pihak pendakwaan. Kegagalan pihak pendakwaan berbuat demikian memudaratkan kesnya (lihat perenggan 36–41).

(5) Siasatan PW4 adalah minimum dan tidak lengkap. Ia gagal membantu mahkamah membuat penemuan faktanya tentang sama ada responden mempunyai pengetahuan bahawa kenderaan tersebut merupakan barang curi dan bahawa dia telah menerima atau menyimpan barang curi secara tidak jujur. Akibat siasatan PW4 yang tidak baik terdapat banyak lompang dibangkitkan dalam kes pihak pendakwaan. Adalah kewajipan dan tanggungjawab pihak pendakwaan untuk mengisi lompang tersebut (lihat perenggan 42 & 47).

(6) Pihak pendakwaan telah gagal membuktikan bahawa responden mempunyai pengetahuan yang kenderaan tersebut membentuk barang curi. Pihak pendakwaan juga tidak boleh menggunakan andaian di bawah s 114(a) Akta Keterangan 1950, memandangkan ia tidak membuktikan elemen-elemen yang perlu. Pertama, terdapat keraguan sama ada kereta yang dijumpai pada hakikatnya adalah barang curi. Kedua, pihak pendakwaan juga gagal menunjukkan bahawa kereta yang dijumpai sebenarnya dalam milikan responden. Ketiga, penemuan kereta tersebut bukan sejurus selepas kecurian itu — ia dijumpai lima hari selepas tarikh ia dilaporkan (lihat perenggan 52–55).]

Notes

For a case on appeal to the High Court, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 187.

For cases on possession of stolen property, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2083–2090.

For cases on prosecution's case, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2967–2972.

For cases on prosecution's witnesses, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2997–3000.

For cases on s 379A of the Penal Code generally, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1730–1740.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16, SC (refd)
Abdul Manap v PP [1967] 1 MLJ 182, HC (refd)
Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, FC (refd)
Mohan Singh a/l Lachman v PP [2002] 3 MLJ 291, CA (refd)
PP v Chan Quee Long [1993] 4 CLJ 262, HC (folld)
PP v Goh Thor Kiah [1952] MLJ 91, HC (refd)
PP v Hong Ah Huat [1971] 1 MLJ 52, HC (refd)
PP v Kasmin bin Soeb [1974] 1 MLJ 230, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16, HC (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433, SC (folld)

Legislation referred to

Criminal Procedure Code ss 308, 310, 314, 314(2)
Evidence Act 150 s 114, 114(a)
Penal Code ss 379A, 411

Shamsul Sulaiman (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution/appellant.

Suraya Othman J:

[1] The respondent was charged in the magistrate's court in Kuala Lumpur under s 379(A) for theft of a Proton Putra and alternatively under s 411 of the Penal Code, for dishonestly receiving stolen property knowing it to be stolen. The charges were as follows:

MAIN CHARGE

> Bahawa kamu pada 2 Mei 2001 antara jam 1 pagi hingga 7 pagi bertempat di tepi jalan hadapan rumah No 79, Jalan Hujan Gerimis 1, OUG Kuala Lumpur di dalam daerah Brickfields, di dalam Negeri Wilayah Persekutuan Kuala Lumpur, telah mencuri sebuah kereta jenis Proton Putra 1.8, warna Kelabu, Nombor Pendaftaran WHC 8162, Chasis No PLIC99DRRXB005728, Enjin No 4G93P-GC9801 bernilai RM52,000 kepunyaan Tang Chee Fung (P) KP: 721127-06-5072. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 379A Kanun Keseksaan.

ALTERNATIVE CHARGE

> Bahawa kamu pada 7 Mei 2001 jam lebih kurang 4 pagi bertempat di No 6772., Jalan Bendahara off Jalan Cochrane Kuala Lumpur di dalam daerah Cheras, di dalam Negeri Wilayah Persekutuan Kuala Lumpur, didapati dengan

curangnya memiliki harta curi sebuah kereta jenis Proton Putra 1.8, warna Kelabu, Nombor Pendaftaran WHC 8162, Chasis No PLIC99DRRXB005728, Enjin No 4G93P-GC9 kepunyaan Tang Chee Fung (P) KP: 721127-06-5072 yang mana kamu tahu atau ada sebab-sebab mempercayai bahawa barang tersebut adalah barang curi. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 411 Kanun Keseksaan.

[2] The respondent pleaded not guilty to both the charges and claimed trial, whereby six prosecution's witnesses were called to give evidence in the prosecution's case. At the close of the prosecution's case, the learned magistrate held that the prosecution had failed to establish a prima facie case and, accordingly, acquitted and discharged the respondent without calling for his defence for both the charges. Being dissatisfied with the decision of the learned magistrate, the public prosecutor appealed to the High Court.

THE FACTS OF THE CASE

[3] The complainant in this case ('PW1') lodged a police report for the lost of his car, a Proton Putra between 1am till 7am on 2 May 2001. During his testimony in the magistrate's court, PW1 agreed that he has no knowledge as to how the incident occurred and who had stolen his vehicle.

[4] According to the raiding officer's evidence ('PW2'), upon information given by one Wong Chee Kong who was arrested in another operation, he arrested the respondent. The said Wong Chee Kong led PW2 and his team to the respondent. Upon arrival at the respondent's premises, PW2 discovered that the respondent was in the midst of repairing his own vehicle. There was another vehicle parked behind the respondent's vehicle of which the respondent denied ownership of.

[5] A search was made on the respondent whereby the police found two keys in the respondent's pocket and one of which can be used to start the vehicle, a Proton Putra ('the said vehicle') which was parked behind respondent's vehicle.

[6] Upon examination of the said vehicle, it was discovered that the said vehicle was reported to be stolen via Cheras Report No 3988/01. Hence, the respondent was arrested for further investigation.

[7] PW1 identified the said vehicle to be his Proton Putra of which was reported to be stolen. Based on the above discovery, the respondent was charged in the Magistrate's Court, Kuala Lumpur under s 379A and alternatively under s 411 of the Penal Code.

[8] One important factor in this case is that there is no ground of judgment prepared or provided by the learned magistrate as the learned magistrate has left the judiciary. Hence in this appeal, I merely relied on the notes of evidence noted down by the learned magistrate at the time of the trial.

[9] Based on the above scenario whereby no grounds of judgment was provided, the petition of appeal ought not to be filed. It is clearly provided by s 308 of the Criminal Procedure Code (FMS Cap 6) ('CPC').

[10] The learned deputy public prosecutor ('DPP') during the proceeding of this appeal admitted that there was a mistake made on the appellant's part in filing the petition of appeal even though no grounds of judgment was provided.

[11] Hence, I am doubtful as to the usefulness of the grounds of appeal as stated in the petition of appeal as the reasons for appeal can only be justified upon examination of the grounds of judgment, if so provided, and in this instant case there was none.

[12] Nevertheless, pursuant to s 310 of the CPC, in order to ensure that substantial justice may be done to the parties involved, I decided to proceed with the appeal without the grounds of judgment and the learned DPP has no objection to it.

[13] The appeal proceeded in the absence of the respondent as the court registrar was unable to serve the notice of appeal on the respondent despite numerous attempts being made. Based on the examination of the record of proceeding, there were several adjournments by this court on the ground of failure to serve the notice of appeal on the respondent. This appeal was fixed on 18 May 2007, 6 July 2007, 11 September 2007, 30 October 2007, 28 January 2008, 1 April 2008 and lastly on 24 June 2008.

[14] On 24 June 2008, the learned DPP informed the court that they could not locate the respondent. The address elicited from a search in the National Registration Department was found to be non-existent. Hence, the learned DPP left it to the discretion of this court whether to continue to proceed with the appeal pursuant to s 314 of the CPC.

[15] Section 314 of the CPC clearly provides as follows:

> (1) If, at the hearing of the appeal, the respondent is not present and the Court is not satisfied that the notice of appeal was duly served upon him, then the Court shall not make any order in the matter of the appeal adverse to or to the prejudice

A of the respondent, but shall adjourn the hearing of the appeal to a future day for his appearance, and shall issue the requisite notice to him for service through the Registrar.

(2) If the service of the last-mentioned notice cannot be effected on the respondent, the Court shall proceed to hear the appeal in his absence.

B

[16] Section 314 of the CPC clearly provides two options to the court which exercises its appellate jurisdiction.

C **[17]** First, in the event the respondent is not present and the court is satisfied that the notice of appeal was duly served on the respondent, the court shall not make any order adverse to or to the prejudice of the respondent and instead will adjourn the hearing of the appeal to a future date. The court registrar will then issue a new notice informing the respondent to D be present on the new hearing date.

[18] Second, in the event the service of the said notice of appeal still cannot be effected on the respondent, the court shall then proceed to hear the appeal in the absence of the respondent.

E

[19] Taylor J in *Public Prosecutor v Goh Thor Kiah* [1952] MLJ 91 in considering s 314(2) of the CPC was of the view that the said section was an exercise in futility. He said that (at p 92):

F ... the incongruity of sentencing a man without his having had the opportunity to be heard was worthless as there would not be a fair prospect of the sentence being enforced ...

His Lordship further stated that:

G ... (this) construction is surprising in that it involves the provision that a person who has been acquitted in one of the lower courts might have his acquittal reversed and a conviction substituted and the sentence passed and that he might be arrested and imprisoned without having any further opportunity whatsoever to present his side of the case. Such a construction is a plain violation of the fundamental principle *audi alteram partem* in my view, is wholly opposed to all H our principles of judicial procedure.

[20] In the above circumstances, the learned judge refused to hear the appeal, did not dismiss it but ordered it to be adjourned to another date.

I

[21] However Abdul Malik Ishak JC (as he then was) in the case of *Public Prosecutor v Chan Quee Long* [1993] 4 CLJ 262 decided to continue hearing the appeal under s 314(2) after giving due consideration to the judgment in the above mentioned case. His Lordship has this to say:

> ... In the instant appeal, I proceeded to hear the appeal in the absence of the respondent holding steadfast to the limitation that 'the court shall not make any order in the matter of the appeal adverse to or to the prejudice of the (absent) respondent'.

[22] I agree with His Lordship Abdul Malik Ishak that the appeal should be proceeded with in the absence of the respondent, for to postpone it further to a later date will only result in a further backlog of cases for this court to dispose of.

[23] Having said that, I shall now proceed with the merit of the appeal. As stated earlier, this appeal is merely based on the examination of the notes of evidence as taken down by the learned magistrate at the time of the trial.

[24] The Court of Appeal in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 has laid down a guide for trial courts to adopt when considering whether the prosecution had made out their cases. Gopal Sri Ram JCA held (at p 400):

> For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution case:
>
> (i) the close of the prosecutor's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution witness. Take into account all reasonable inferences that may be drawn from that evidences. If the evidence admits of two or more inferences, then draw the inference that is more favourable to the accused;
>
> (ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent, am I prepared to convict him on the evidence now before me? If the answer to that question is 'yes' then a prima facie case has been made out and the defence should be called. If the answer is 'No' then a prima facie case has not been made out and the accused should be acquitted; ...

[25] The above principle was discussed and affirmed in the case of *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301.

[26] Based on the above said legal principle, it is the duty of this court to determine whether the prosecution has established a prima facie case against the respondent for any of the two said charges.

[27] For the first charge i.e. theft of a motor vehicle under s 379A of the Penal Code, the primary issue to be determined is whether the elements of the charge were satisfied by the prosecution. The essential ingredients of s 379A are as follows:

(i) the property in question was a motor vehicle or a component part thereof;

(ii) the accused took such property out of the possession of another person;

(iii) the taking was without the consent of the person in possession;

(iv) there was some movement of the said property so as to constitute taking;

(v) the accused took such property with the intent to cause —

(c) wrongful loss to the person who has possession of the property; or

(d) wrongful gain to himself.

[28] Based on the examination of the notes of evidence, I am satisfied that the prosecution has failed to satisfy the essential ingredients of s 379A of the Penal Code. Other than proving that the property is a motor vehicle ie a car (vehicle), the prosecution has failed to prove the remainder ingredients. There was no evidence indicating or witnesses that implicated the respondent stole the vehicle at the time and place as stipulated in the charge, and this include PW1, the complainant who had no idea who stole his vehicle.

[29] The investigation officer ('PW4') himself in his investigation was unable to answer to this fact as to whether the said vehicle was stolen by the respondent. Also based on the evidence, it is clearly stated that at the time of arrest, the respondent was not driving the said vehicle. The only evidence against the respondent was that the key to the ignition of the said vehicle was found in the respondent's pocket and the said vehicle was within the respondent's premises. As such based on the above facts, it is highly insecure to call upon the respondent to enter his defence to the charge under s 379A of the Penal Code as the prosecution has failed to establish a prima facie case and the learned magistrate's decision in acquitting and discharging the respondent without calling for his defence is proper and correct in the circumstances.

[30] Now, on the alternative charge of dishonestly receiving stolen property under s 411, the essential ingredients to be proven by the prosecution are as follows:

(i) the property in question was stolen property;

(ii) the accused received or retained such stolen property; A

(iii) the accused did so dishonestly knowing or having reason to believe that it was stolen property.

[31] As stated earlier, at the time of arrest, the said vehicle was not driven by the respondent. Merely the key to the ignition of the said vehicle was found in the respondent's pocket and the said vehicle was within the respondent's premises. B

[32] The primary question here is whether from the facts as stated above, the prosecution has established a prima facie case against the respondent under s 411 of the Penal Code which warrants the respondent to be called to enter his defence. C

[33] The answer to the above is depended on the supportive evidence tendered by the prosecution. D

[34] In his evidence in court, PW1 identified the said vehicle to be his vehicle which was stolen. According to him there was no apparent changes made to the said vehicle except for the tyres and radio. E

[35] However, I was doubtful as to whether the said vehicle which was identified by PW1 as his vehicle is the same one which was reported to be stolen by him. This is because the arrest report of the respondent and the seizure of the said vehicle is in connection with the theft reported via Cheras Report No 3988/2001. It is totally different from the report lodged by PW1 ie Petaling Report No 3956/2001. F

[36] This discrepancy is a material fact for the court to consider. No explanation was given by the prosecution with regard to this issue and the investigation officer, PW4 himself had no knowledge about Cheras Report No 3988/2001 and presumed that it is of no importance. G

[37] It is crucial for the court to understand the reason behind the discrepancy of police reports. In the event the arrest and seizure by the police is in connection to the theft lodged by PW1, then it should be in connection with Petaling Report No 3956/2001 and not Cheras Report No 3988/2001. H

[38] Further, the respondent was arrested upon information by one named Wong Chee Kong. The said Wong Chee Kong was arrested in connection with other cases totally different from that of the respondent. Based on the information given by Wong Chee Kong, the police went to the respondent's premises and discovered the said vehicle. I

[39] Since Wong Chee Kong has close connection to the arrest of the respondent and seizure of the said vehicle, it is my opinion that he ought to be called to give evidence and be cross-examined on the matter. Further, the arresting officer, PW2 during cross-examination also agreed that the presence of Wong Chee Kong is crucial to explain the whole scenario.

[40] With regard to this issue, I agree with the principle stated in the case of *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433. It was held in that case that:

> While the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it also has the duty to call all necessary witnesses essential to the unfolding of the narrative of the prosecution case to establish proof against the accused beyond all reasonable doubt. At the very least, the prosecutor should make them available for cross-examination by the defence. If the prosecution failed to fulfill this duty, the accused must be acquitted.

[41] Hence, it is my view that the failure of the prosecution to call Wong Chee Kong was fatal to the prosecution's case since to accept the conflicting evidence without calling that witness to explain or be cross examined would cause miscarriage of justice to the respondent.

[42] Further, it is my opinion that the investigation carried out by the investigation officer, PW4 was minimal and incomplete. It totally failed to assist this court in making finding of facts as to whether the respondent has any knowledge that the said vehicle was stolen property and that he received or retained the stolen property dishonestly.

[43] PW4 also failed to carry out further investigation or to take any statement from Wong Chee Kong. During testimony in court, PW4 stated that Wong Chee Kong's statement was not crucial as such no further investigation was made.

[44] Why is this so? How can an investigation officer state that Wong Chee Kong's statement is not crucial when the respondent was arrested and the said vehicle was seised based on his information?

[45] Further, through PW4's investigation, the respondent had indeed informed him that the said vehicle was purchased from someone by the name of 'Ah Wah'. However, no further investigation was carried out by PW4 with regard to this.

[46] PW4 also gave uncertain answers when it was suggested by defence counsel that the respondent totally had no knowledge that the said vehicle was a stolen vehicle.

[47] As such, it is my opinion that due to this poor investigation, it has raised a lot of gaps in the prosecution's case. It is the prosecution's duty and responsibility to fill up the gaps (see *Mohan Singh a/l Lachman v Public Prosecutor* [2002] 3 MLJ 291, *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 and *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16).

[48] It was decided in the case of *Mohan Singh a/l Lachman v Public Prosecutor* that:

> (4) The burden of proving its case at every state lies on the prosecution. The only task of the accused is to raise a reasonable doubt as to the prosecution's case. If there are gaps in the case for the prosecution, these cannot be filled by resorting to a purported failure on the part of the defence to put specific question relevant to its case. Such gaps must be filled by the prosecution itself.

[49] Based on the above mentioned case, it is my opinion that the prosecution has failed to prove that the respondent had knowledge that the said vehicle was a stolen property. By merely finding the key to the said vehicle in the respondent's possession and the said vehicle parked in the respondent's premises are insufficient to prove that the respondent has knowledge that the vehicle is a stolen vehicle.

[50] Further, I wish to touch on whether the prosecution may rely on s 114(a) of the Evidence Act 1950. Section 114(a) of the Evidence Act 1950 provides that:

> The court may presume —
>
> (a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.

[51] Reference was made to the case of *Public Prosecutor v Hong Ah Huat* [1971] 1 MLJ 52. Based on the principle stated in that case, the following three elements must exist before the presumption under s 114(a) of the Evidence Act 1950 can be invoked. They are:

(i) the said vehicle is a stolen property;

(ii) it in the respondent's possession;

(iii) in the possession soon after the theft.

(*Abdul Manap v Public Prosecutor* [1967] 1 MLJ 182 also referred.)

[52] It is my opinion that none of the above mentioned elements were successfully proven by the prosecution in order for the prosecution to invoke the presumption under s 114(a) of the Evidence Act 1950.

[53] First, the discrepancy of the reference of the police report as stated earlier had raised doubt as to whether the said vehicle was a stolen property.

[54] Second, the prosecution also failed to prove that the said vehicle was actually in the possession of the respondent. As stated in *Public Prosecutor v Hong Ah Huat*:

> ... possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object.

[55] Third, the discovery of the said vehicle was not soon after the theft. The said vehicle was only discovered after five days from the date it was reported to be stolen. The period of five days is rather a long period for the prosecution to invoke the presumption under s 114(a) of the Evidence Act 1950 as anything can happen to the said vehicle within the five days period. As stated earlier, the fact that the respondent claimed that he purchased the vehicle from one by the name of 'Ah Wah' was never investigated, when this could have been done to ascertain the truth of the respondent's claim.

[56] Mohamad Azmi J (as he then was) in the case of *Public Prosecutor v Kasmin bin Soeb* [1974] 1 MLJ 230 has this to say with regard to this issue:

(1) the mere evidence of leading the police to spot, even if hidden, falls short of proving retention; there was no evidence of possession to raise the presumption under s 114(a) of the Evidence Act 1950;

(2) evidence that an accused person has pointed out object or places to police was of little value and was often prejudicial to the accused unless the information which led to the discovery was disclosed at the same time.

[57] Based on the above legal principles, and the facts narrated, I found that the presumption under s 114(a) of the Evidence Act 1950 cannot be relied on by the prosecution.

[58] In the circumstances, I am unable to see that the decision made by the learned magistrate to acquit and discharge the respondent on both the charges without calling for his defence was wrong as he had taken all relevant

factors and weaknesses of the prosecution case before coming to his decision. For all these reasons I dismiss the appeal by the prosecution. The decision by the lower court is thereby affirmed.

Appeal dismissed.

Reported by Andrew Christopher Simon